

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1035 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

J

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? Yes to the concerned learned Magistrate wherever he might be in service.

-----

PATEL UPENDRABHAI SHANKARBHAI

Versus

TADVI AMBUBHAI MOHANBHAI

-----

Appearance:

Shri S.D.Patel, Advocate, for the appellant.

Shri J.G.Shah, Advocate, for Respondents Nos.1 to 7, 10 to 18, 20 to 26.

Shri J.V.Dastoor, Advocate, for Respondent No. 9 (Amicus curiae).

Shri M.A.Bukhari, Additional Public Prosecutor, for Respondent No.28.

Respondents Nos.8, 19 and 27 - the Appeal dismissed against them for non-prosecution.

-----

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 24/10/96

ORAL JUDGEMENT

The order passed by the learned Judicial Magistrate (First Class) at Sankheda on 16th July 1985 dismissing the complaint and thereby acquitting the accused (respondents Nos. 1 to 27 herein) on the ground of absence of the complainant is under challenge in this appeal at the instance of the original complainant by special leave of this court under Section 378 (4) of the Code of Criminal Procedure, 1973 (the Cr.PC for brief).

2. It is not necessary to set out in detail the facts giving rise to this appeal. It may be sufficient to note that some untoward incident occurred at the time of festival of Holi on 6th March 1985 between the appellant - complainant on the one hand and respondents Nos. 1 to 27 herein on the other. The appellant herein was aggrieved by the way he was treated by respondents Nos. 1 to 27 herein at the relevant time. He therefore approached the police for filing his complaint of the incident in question. It appears that the police did not accept his complaint. He thereupon filed his complaint in the Court of the Judicial Magistrate (First Class) at Sankheda on 25th March 1985 charging respondents Nos. 1 to 27 herein with the offences punishable under Sections 144, 146, 147, 148, 149, 153, 153-A, 159, 160, 352, 323, 504, 506 (2), 511 and 114 of the Indian Penal Code, 1860 (the IPC for brief). It came to be registered as Criminal Case No.487 of 1985. The learned trial Magistrate by his order passed therebelow on that very day of 25th April 1985 ordered issue of summons with respect to the offences punishable under Sections 323, 504 and 114 of the IPC. It appears that the matter was kept for further proceeding from time to time from 10th May 1985. It appears that in the meantime plea of the accused was recorded on 29th May 1985. No accused pleaded guilty to the charge. It later on came to be adjourned to 16th July 1985. The complainant did not appear and he appears to have sent his sick report through his advocate. It is at Exh.31 on the record of the trial court. It appears that, in response thereto, an affidavit was filed by respondent No.13 herein to the effect that the appellant herein was not really sick and his sick report was not genuine. It is at Exh.32 on the record of the trial court. It may be mentioned at this stage that the sick report submitted on behalf of the appellant herein in the trial court was accompanied by a medical certificate. Despite that position, by his order passed below the complaint on 16th July 1985 in Criminal

Case No.487 of 1985, the learned Judicial Magistrate (First Class) at Sankheda dismissed the complaint on account of absence of the appellant - complainant and acquitted the accused of the offences mentioned in the complaint. That aggrieved the complainant. He has therefore by special leave of this court invoked its appellate jurisdiction under Section 378 (4) of the Cr.PC for questioning the correctness of the aforesaid order passed by the learned trial Magistrate.

3. Learned Advocate Shri S.D. Patel for the appellant is right in his submission that the correctness of the medical certificate could not have been doubted merely on the strength of some affidavit filed by and on behalf of an interested accused without giving an opportunity to the original complainant with respect to the contents of the affidavit in question or without examining the author of the medical certificate accompanying the original complainant's sick report. When a person reports sick and he produces a medical certificate in support of his sick report, ordinarily the court has to accept the same without demur unless the court is convinced that the medical certificate is not genuine. Before coming to the conclusion that the medical certificate is not genuine, it would be necessary to make inquiry in that regard. Merely an affidavit of an interested accused should not enable the presiding officer of a criminal court to jump to a conclusion that the medical certificate is not genuine without giving an opportunity to the original complainant for explaining the contents of the affidavit or without giving an opportunity to the medical officer with respect to the contents of his certificate. To doubt the genuineness of a medical certificate without giving an opportunity about its correctness to the concerned person or the concerned medical officer would tantamount to condemning unheard by passing strictures against the person reported to be sick and more particularly against the medical officer issuing such certificate. It is a settled principle of law that no person should be condemned unheard. To condemn a person unheard by relying on some affidavit of an interested accused would not be a correct approach in the eyes of law. Such an approach on the part of a presiding officer of a court cannot be sustained in law and it has to be deprecated in terms. The approach and the attitude of the learned trial Magistrate as reflected in his impugned order can therefore never be countenanced and it cannot be sustained in law. It appears that the learned trial Magistrate at the relevant time was suffering from the disposal mania and he wanted an excuse or a pretext to dispose of the cases on merits or otherwise. In this

case, he has not chosen to examine the merits of the case for disposing it from his file. This approach on the part of the learned trial Magistrate has to be disapproved without mincing words.

4. I think the learned trial Magistrate ought to have realised that the complaint filed by the original complainant resulted in a summons trial and the order under Section 256 of the Cr.PC would result in acquittal of the accused. The original complainant will be left with no alternative but to approach this court to appeal under Section 378 (4) thereof after obtaining its special leave. It cannot be gainsaid that such an order would subject the original complainant to unnecessary harassment and undue expenses. I wish the learned trial Magistrate had realised such plight of the original complainant before passing the impugned order under Section 256 of the Cr.PC.

5. Ordinarily, in view of my aforesaid discussion, I should accept the appeal and to set aside the impugned order and to remand the matter to the trial court for restoration of the proceeding to file and for his fresh decision according to law. However, prudence requires not to do so. The reason therefor is quite simple. The incident giving rise to the criminal proceeding is stated to have occurred on 6th March 1985. It was the festival of Holi. In the midst of festivity, some untoward incident appears to have taken place hurting the present appellant. The wounds at the relevant time were fresh. More than eleven years have rolled by since then. Papa time might have healed the wounds by this time. The complainant and the accused appear to be residents of the same village. It would not be a very big village. They can therefore be said to be practically neighbours. By this time enmity and hostility between the complainant and the accused might no longer be surviving. It is not necessary to reopen the wounds which might have been healed by passage of such a long time. I think it would be desirable to allow the matter to remain at rest for good. In that view of the matter, I think the impugned order passed by the learned trial Magistrate need not be disturbed or interfered with in this appeal if much to the chagrin of the appellant - complainant. Such disposal of this appeal might spare him from the trouble of visiting the criminal court from time to time and expenses for fighting out his case. That would also avoid creation of any fresh enmity and hostility between the parties.

6. It would not be out of place to mention the

useful assistance rendered by learned Advocate Shri Dastoor for respondent No.9 as amicus curiae.

7. In the result, this appeal is dismissed not on account of want of merits but on account of long passage of time.

@@@@@@@@@@@@@@@@